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IN THE SUPREME COURT

OF THE

FILED

OCT 4 - 1957

STATE OF UTAH

Clerk, Supreme Court, Utah

CRANE CO., a corporation,

Plaintiff and Appellant

-vs-

UTAH MOTOR PARK, INCORPORAT-
ED, a corporation,

Defendant and Respondent

Case

No. 8713

UNIVERSITY UTAH

JAN 10 1958

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APPELLANT'S BRIEF

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APPELLANT'S BRIEF

STATEMENT OF FACTS

The Plaintiff seeks to recover from the Defendant the value of a boiler installed in the Defendant's place of business. The action is founded on Chapter 2 of Title 14, Utah Code Annotated 1953, which provides in substance if an owner of land enters into a contract of \$500.00 or more for

an improvement on the land and fails to obtain from the contractor a bond for the protection of those who furnish labor and material in connection with said improvement, that such owner becomes personally liable to those who so furnished labor and material.

The invoice for the sale of the boiler, Exhibit 1, contains the following statement:

“The merchandise specified in this order is purchased for resale, and therefore is not subject to the State Sales Tax.”

At the pre-trial hearing Judge Ellett stated as follows:

The record may show that I am going to grant the defendant's motion to dismiss, and I do it upon the ground and for the reason that Pretrial Exhibit No. 1 shows that Crane Company had sold the same to Walsh Plumbing and Heating Company for resale and that they were not the owner of the boiler and equipment at the time it was placed in the property of the Utah Motor Park, Incorporated. (Record 7)

The action was dismissed by order of the court (Record 14) and appeal taken therefrom to this court (Record 15). An attempt was made by counsel for the Plaintiff in the pre-trial hearing, but without much success, to obtain a stipulation of facts which would be helpful to this court. However, we believe it will not be disputed that the boiler in question was recommended by the Plaintiff as being appropriate for the needs of the Defendant, and was purchased from the Plaintiff by Walsh Plumbing Co. and installed by Walsh in the Defendant's place of business, and that it was delivered by Plaintiff directly to the Defendant's place of business.

STATEMENT OF POINTS

1. The Court erred in dismissing Plaintiff's complaint.

ARGUMENT

1. The Court erred in dismissing Plaintiff's complaint.
- Section 14-2-2 Utah Code Annotated 1953 provides as follows:

Failure to require bond—Direct liability.—Any person subject to the provisions of this chapter, who shall fail to obtain such good and sufficient bond, or to exhibit the same, as herein required, shall be personally liable to all persons who have furnished materials or performed labor under the contract for the reasonable value of such materials furnished or labor performed, not exceeding, however, in any case the prices agreed upon.

It is obvious that a statutory liability is created against the owner under the circumstances stated. Thus, although an owner has not dealt with those who furnish material, so as to be liable to them on a contractual basis, the statute creates a liability in their favor against the owner. The ruling of the trial court seems to imply that in order for a materialman to come under the statute he must have dealt with the owner. If this were true, there would be no reason for the statute, as the owner would be liable to him on a contractual basis in any event. The trial court said that the Plaintiff could not recover because it was not "the owner of the boiler and equipment at the time it was placed in the property of the Utah Motor Park, Incorporated." If the statute is inter-

puted to mean that the materialman must be the owner of the property at the time of its installation, the contractual relationship would have to be between the materialman and the owner. Under such circumstances a liability by contract would be established between the parties, and there would be no reason for the statute to create a liability which already exists. It is only when a contractual relationship is established between the materialman and the contractor that the existence of the statute can be justified. That the property was sold to Walsh for the purpose of resale does not prevent recovery by plaintiff under the statute. As a matter of fact it would seem that the statute contemplates a resale of the property by the contractor to the owner in every instance.

This court has construed the statute on at least two prior occasions. The first was in *Rio Grande Lumber Co. v. Darke*, 50 Utah 114, 167 Pacific 241. The Plaintiff Lumber Co. sued Darke who was the contractor, and Webb and wife, who were the owners, for material furnished by the Plaintiff for the construction of a building on the land of the Webbs. The complaint alleges that the "Plaintiff extended credit to Defendant Darke and delivered materials to him. . . ." The court held the statute constitutional and affirmed the judgment for the Plaintiff, and stated on page 246:

If the owner requires the contractor to procure the statutory bond, he is protected against loss. If he does not, he becomes liable to laborers and materialmen if the contractor fails to pay them, even though he may have paid the contractor in full. He has his remedy in his own hands.

The second case is *Liberty Coal and Lumber Co. v. Snow*, 53 Utah 298, 178 Pacific 341. Here the Plaintiff materialman brought suit against Victor H. Snow, the owner, for materials furnished to A. H. Snow, the contractor, which were used in the construction of a dwelling on the owner's property. The Supreme Court affirmed the judgment for the Plaintiff and stated on page 343:

The purpose of the statute is to prevent the owners of land from having their lands improved with the materials and labor furnished and performed by *third persons*, and thus to enhance the value of such lands, without becoming personally responsible for the reasonable value of the materials and labor which enhances the value of those lands. The owner, may, however, escape personal liability by obtaining the bond required by the statute. In this case the agreement between appellant and his father required the latter to construct a dwelling upon the land of the former. To do that materials and labor were necessarily required. It therefore became the duty of appellant to require his father to execute the bond provided for by the statute for the protection of those who might furnish materials for and perform labor on the dwelling which became part of the land in question and which enhanced its value. We are forced to the conclusion, therefore, that appellant is liable in this action for the value of the materials as found by the jury. (Emphasis ours)

The statute provides that the owner who shall fail to obtain the bond "shall be personally liable to *all* the persons who have furnished materials. . . ." (Emphasis ours)

In each of the cases above cited the Plaintiff was allowed to recover from the owner, although he had no con-

tractual relationship with the owner. The contractual relationship in each case was between the materialman and the contractor. A sale of materials from the materialman to the contractor occurred. The contractor became obligated to pay for the same, and title passed to the contractor, and he in turn in effect resold the material to the owner by installing the same in the building.

It is clear from the statute as well as the cases in which this court has construed the same, that although a resale of the merchandise was contemplated, such does not afford defendant a defense to the claim of the Plaintiff herein sued upon.

WHEREFORE, Plaintiff and Appellant respectfully requests this court to set aside and reverse the order of dismissal of the trial court and to make such appropriate order as to permit this case to continue in the trial court.

Respectfully submitted,

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